IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	**)**	
	)	
ROBERT LEE AND	**)**	
JACQUELINE MILDRED CLEMENTS,	**)**	**Case No. 98-11065**
	)	
Debtors.	**)**	**Chapter 7**
	)	

MEMORANDUM AND OPINION

This case is before the Court on the Chapter 7 Trustee's Motion and Notice to Employ Attorney Nunc Pro Tunc. The Trustee reopened the Clements' no-asset Chapter 7 case after substantial assets were located. The Trustee recovered sufficient funds to pay a 100% dividend on the claims filed with a surplus remaining, however the Trustee failed to apply for the employment of his law firm as required by 11 U.S.C. § 327.[1] In his motion, the Trustee seeks to have his law firm employed nunc pro tunc so that he may collect his fees and expenses incurred while pursuing debtors' assets. The United States Trustee objects to the Trustee's motion. The Chapter 7 Trustee, Edward J. Nazar appears pro se. The United States Trustee appears through William F. Schantz. After careful review of the relevant facts and law, the Court concludes that the Trustee's Motion for Employment of Attorney Nunc Pro Tunc should be granted.

FACTS

Robert and Jacqueline Clements ("Clements") filed their Chapter 7 petition on March 18, 1998 in the United States Bankruptcy Court, Wichita Division. At first glance, the case was considered a no-asset Chapter 7 and a Discharge and Final Decree was filed on July 24, 1998.

[1]Hereafter, all references are to 11 U.S.C. unless otherwise noted.

Approximately five months later, the Trustee petitioned to reopen the Clements' bankruptcy case after discovering assets that were available for distribution to creditors. The Trustee also sought turnover of escrow contracts and closing statements relating to the sale of the real estate properties. The case was reopened on January 5, 1999. On January 21, 1999, the Trustee filed a Notice of Recovery of Assets stating he had recovered assets or potential assets initially valued at $10,078.80. The assets included monies the Clements' received from the sale of 801 Alexander, Winfield, Kansas, to Dean Row, and 419 Iowa, Winfield, Kansas, to James McCraney, the Clements' son. The case was re-noticed as an asset case and the Court set a deadline for filing claims. Thereafter, the United States Trustee reported that there was a surplus of funds to pay timely filed claims which could be used to pay the Trustee's fees and expenses, however the Trustee failed to secure pre-approval for the employment of his law firm as required by § 327. The Trustee's worksheet for the Clements' case which is attached to the Trustee's nunc pro tunc motion, shows that on November 20, 1998, the Trustee billed .4 hours for drafting an Application and Order to Employ Attorney. Due to an apparent and unattributable oversight, this application was never filed with the bankruptcy court. The Trustee now seeks a nunc pro tunc order authorizing the employment so that he may collect his fees and expenses. The United States Trustee objected and the Court took the matter under advisement.

DISCUSSION

It is well-established that bankruptcy courts have the authority and discretion to approve nunc pro tunc orders for the employment of counsel. See In re Ibbetson, 100 B.R. 548, 550 (D. Kan. 1989); In the Matter of Triangle Chemicals, Inc., 697 F.2d 1280, 1289 (5th Cir. 1983). For the Court to approve an order for employment nunc pro tunc, the order must satisfy the

disinterestedness test of § 327[2] and reflect the existence of extraordinary circumstances. Courts differ as to what circumstances must exist for retroactive employment to be allowed. Some courts believe retroactive employment should be allowed where counsel rendered valuable services to the debtor and equitable considerations override the inadvertent failure to seek pre-approval. See Stolkin v. Nachman, 472 F.2d 222, 226 (7th Cir. 1973); In re Glinz, 36 B.R. 17, 19 (Bankr. D. N.D. 1983). Other courts believe that "exceptional circumstances" must be present, although there is a split over what constitutes "exceptional circumstances." At least one highly-respected case holds that attorney oversight and neglect are exceptional circumstances. See Triangle, 697 F.2d at 1289. Another line of cases is more rigid in their definition of exceptional circumstances, holding that counsel's inadvertence or neglect is not enough; the attorney must show hardship beyond his/her control. See In re Arkansas Co., Inc., 798 F.2d 645 (3d Cir. 1986). The Tenth Circuit follows the Arkansas approach. See Land v. First Nat'l Bank of Alamosa (In re Land), 943 F.2d 1265, 1267-68 (10th Cir. 1991); Ibbetson, 100 B.R. at 550; In re Franklin Savings Corp., 181 B.R. 88, 90 (Bankr. D. Kan. 1995). Lastly, at least one other case holds that lawyers and other professionals must only exercise "ordinary care" in receiving the bankruptcy court's authorization before rendering services. See In the Matter of Singson, 41 F.3d 316, 319 (7th Cir. 1994).

Undeniably, this Court would have initially approved the Trustee's order for employment of his law firm as counsel. The Trustee had administered the case as a no-asset case before the Discharge and Final Decree was issued and met the requirements of § 327. Therefore, the issue is whether the circumstances justify granting retroactive effect to the order.

The Court exercises its discretion in deciding whether the particular circumstances of this

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[2]To meet the disinterestedness test of § 327, the applicant must be disinterested, not have an adverse interest and prove that the services performed were necessary under the circumstances.

case excuse the Trustee's failure to seek pre-approval of employment. See Ibbetson, 100 B.R. at 550. The Court should consider factors such as whether the Trustee or some other person bore responsibility for applying for approval; whether the Trustee was under time pressure to begin service without approval; the amount of delay after the Trustee learned that initial approval had not been granted; the extent to which compensation to the Trustee will prejudice innocent third parties; and other relevant factors. See Ibbetson, 100 B.R. at 550-51(citing In re Arkansas Co., 798 F.2d at 649-50). In Ibbetson, the Court relied on these factors to conclude that the "farm financial crisis" and other pressures, the reliance on "inexperienced, underpaid and overworked young associates," and the "confusion surrounding the departure of the young associate handling the details of the case" were not sufficiently extraordinary to warrant retroactive approval of the employment order. 100 B.R. at 551.

Here, the Trustee drafted the pleadings necessary to secure his firm's appointment but, through apparent inadvertence, those pleadings were never filed. The Trustee's efforts yielded a rare result: a 100% dividend payment even considering payment of the administrative expenses. This Court knows well that all Trustees in this division rely on staff to effectuate the filing of papers and that they each operate under substantial exigencies of time to protect and maximize the estates entrusted to them. No one disputes here that the Trustee sought to remedy the omitted filing after learning of it and, perhaps most importantly, the law firm's compensation will in no way prejudice the dividend paid to creditors.

After considering the factors listed by the Ibbetson court, denial of this nunc pro tunc application would be harsh and inflexible. The bankruptcy court is a court of equity. See Marin v. Bank of England, 385 U.S. 99, 103, 87 S. Ct. 274, 277 (1966) (Recognizing the "overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.") The

instant motion presents facts markedly different from those before the Tenth Circuit in In re Land, 943 F.2d at 1267. (Attorney repeatedly filed inadequate § 329 disclosures, refused to cooperate with the Court, and failed to apply for appointment for over four years notwithstanding prior court order.) It would be inequitable and unfair to deny the Trustee his fees and expenses when he has labored honestly and diligently for the benefit of the estate and the creditors by discovering assets in a no-asset Chapter 7 so that the creditors who timely filed their claims will receive the full amount of their claim. See Glinz, 36 B.R. at 19. Without the Trustee's involvement, the creditors would have received nothing.

Additionally, the parties have not shown that prejudice would occur by granting the nunc pro tunc order. The United State Trustee, the only party who objected to the nunc pro tunc order, objected because it was not timely filed and did not advance any argument for withholding equity. Ironically, the Trustee is the only party who stands to be prejudiced in this action.

Both the Trustee and the United States Trustee's Office consented to the submission of this matter on the pleadings. In filing its objection, the Trustee's Office is performing its duty as a watchdog of the bankruptcy system, a duty which the Court both respects and values. However, simple equity requires that its objection be overruled.

The Court is not concerned that in granting this motion it encourages or rewards laxity and circumvention of the statutory requirement. Ibbetson, 100 B.R. at 550. The bankruptcy court has full control over the allowance of fees before or after formal employment, thereby preventing attorneys from abusing the Code. See In re King Electric Co., Inc., 19 B.R. 660, 663 (E.D. Va. 1982). As mentioned above, there is a full payout of claims and a surplus of funds to pay the Trustee's fees and expenses. Trustees and their counsel should understand however, that the Court expects their timely compliance with the rules pertaining to the employment of professionals.

Trustees should immediately file applications for employment upon their discovery of assets in a no-asset case. The presence of a "bird's nest on the ground" will not assure them of nunc pro tunc relief in every (indeed, in any) case. This grant of relief should be considered as extraordinary as the inadvertent circumstances prompting it.[3] However, equity dictates that this Court rule in a fair and judicious manner. Therefore, the Trustee's Motion and Notice To Employ Attorney Nunc Pro Tunc is GRANTED.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. The Judgment on Decision based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

Dated at Wichita, Kansas this ____ day of October, 2000.

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ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE

[3]In Singson, 41 F.3d at 319, the Court correctly states that neither § 327 nor Rule 2014 requires court approval before performing services. Although prior court approval is preferred because it "permits close supervision of the administration of an estate, wards off 'volunteers' attracted to the kitty, and avoids duplication of effort," the statute and rule do not forbid or even reprove belated authorization. Thus, the Court held that per Fed. R. Bankr. P. 9006, counsel must show "excusable neglect" to prevail on a motion for employment nunc pro tunc.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **MEMORANDUM AND OPINION** was deposited in the United States mail, postage prepaid on this 27th day of October, 2000, to the following:

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